BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by Jodi Kalbfleisch dated December 6, 1999 alleging discrimination with respect to employment on the basis of disability.

B E T W E E N:

Ontario Human Rights Commission

-and-

Jodi Kalbfleisch

Complainant

-and-

Ruel Carillo and 1321257 Ontario Ltd.

Respondents

DECISION

Adjudicator: Steven J. Faughnan

Date: September 18, 2002

Board File No.: BI-0436-01

Decision No.: 02-016

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Brian Smith, Counsel
Jodi Kalbfleisch, Complainant	)	Anne-Marie Tymec, Counsel

No one appearing for the Respondents

INTRODUCTION

This proceeding arises under *Human Rights Code*, R.S.O. 1990, c. H. 19, as amended (the "*Code*"). The Ontario Human Rights Commission (the "Commission") referred to the Board of Inquiry (the "Board") the Complaint of Jodi Kalbfleisch (the "Complainant") alleging discrimination in employment on the basis of handicap (now expressed as disability, see S.O. 2001, c. 32, s.27) under subsection 5(1) of the *Code* (the "Complaint").

Except for sending a letter to the Board setting out their position on liability under the *Code*, Ruel Carillo and 1321257 Ontario Ltd. (the "Respondents") did not otherwise participate in the proceedings before the Board, although given ample opportunity to do so and having been warned of the consequences of their inaction. The matter proceeded in their absence.

ISSUES

In this decision the Board deals with the following issues:

(1) Did the Respondents discriminate in employment under the *Code* by terminating the Complainant after she suffered an epileptic seizure at work?

(2) If so, have the Respondents proved a legal justification or defence?

(3) If a right under the *Code* has been infringed, what is the appropriate remedy?

(4) Finally, does the failure to claim postjudgment interest in the Statement of Facts and Issues filed by the Commission result in no postjudgment interest being awarded?

DECISION

The Respondents infringed the rights of the Complainant under the *Code*, entitling the Complainant to the relief set out in the Order that follows this decision.

PROCEDURAL SEQUENCE

The subject matter of the Complaint was referred to the Board by letter from the Commission dated October 15, 2001. A notice of hearing dated October 18, 2001 (the "Notice of Hearing") was then forwarded to the parties indicating that the hearing of this matter would commence via a telephone conference call to take place on November 8, 2001 at 5:30 p.m. The Notice of Hearing, which was forwarded to the last known address of the Respondents, warned that if a party was not available to receive the conference call, the hearing may proceed without their participation. The Notice of Hearing further indicated that a non-participating party would be notified of the hearing dates but would not be entitled to any further notice of the proceedings.

The conference call proceeded as scheduled on November 8, 2001. The Respondents did not participate in the call. Although the Respondents did not participate, there was a willingness on the part of the Commission and the Complainant to allow the Respondents an opportunity to participate in mediation. Accordingly, dates for the exchange of pleadings and a mediation date were set at the conference call. This was confirmed in a letter from the Board to the parties dated November 20, 2001. This letter was send by registered mail. The copy of the letter that was sent to the Respondents was returned to the Board undelivered.

In accordance with the Board's direction the Commission served the Respondents with the Commission's Statement of Facts and Issues and disclosure, which was accompanied by a letter dated January 2, 2002. This material was originally sent by courier but could not be delivered in that fashion. The Commission then forwarded the materials by regular letter mail, which, Commission counsel advises, was not returned. In the Commission's letter dated January 2, 2002, the Respondents were informed that their Response under Rule 36 of the Board of Inquiry *Rules of Practice* (the "*Rules*") and disclosure under Rule 41 of the *Rules* was to be provided by January 11, 2002.

As the Respondents did not attend at the scheduled mediation date, a case management-

prehearing conference call was held on March 20, 2002. The Respondents did not participate in the telephone conference call. As set out in a letter from the Board dated March 22, 2002 and forwarded to all the parties by regular letter mail, during the call hearing dates were set for May 2, 3 and 8, 2002, with a further case management-prehearing conference to take place by telephone at 9:30 a.m. on April 25, 2002.

Further to an undertaking given at the conference call on March 20, 2002, the Commission then forwarded a letter dated March 27, 2002 to the Board which indicated that the result of their most recent search confirmed that the address of Mr. Carillo, who is a director of 1321257 Ontario Ltd., was the address to which all previous correspondence had been sent.

After the telephone conference call of March 20, 2002, a staff member of the Board contacted Mr. Carillo on March 27, 2002, at a number that the Commission had provided for his current workplace. As set out in a letter from the Board dated April 3, 2002, sent by regular letter mail to his last known address, during the call, Mr. Carillo was advised of the conference call scheduled for April 25, 2002. Apparently, in the course of that telephone conversation he indicated that he was not available to take that conference call until 12:30 p.m. on that day. As confirmed in the Board's letter dated April 3, 2002, the Commission and the Complainant agreed to the requested time change. Messages were then left for Mr. Carillo to advise him of the accommodation, however, as also set out in the Board's letter dated April 3, 2002, Mr. Carillo never responded to these messages by return telephone call. The letter of April 3, 2002 ended by highlighting the previously scheduled hearing dates and for the information of the parties, a copy of correspondence dated March 30, 2002, that was forwarded to the Board by Mr. Carillo, was enclosed.

The first two full sentences of Mr. Carillo's correspondence state as follows:

> Your calls to the workplace have been disruptive and I do not wish to be disturbed there. I urge you to make a decision based on your investigation. However, I would like to reiterate my side in this letter.

The balance of the correspondence presents his version of the salient facts relating to the allegations of discrimination and finishes with the following synopsis:

I made the decision to terminate her because:

1. She could not perform the essential duties of the job note: this would also apply to people who are not handicapped.
2. She was under the Probationery (*sic*) period and I have the right to terminate her.
3. I considered her responsible for the incident because she did not get enough rest before coming to work.

I did not refuse her employment, therefore, I did not discriminate.

She was given a chance to perform the same duties like everyone else. She failed. Therefore, she was terminated under the probationery (*sic*) period.

After the synopsis, the following conclusion was set out:

This case is more likely a case of wrongful dismissal, not discriminiantion (*sic*).

Mr. Carillo did not participate in the case management-prehearing conference call that took place on April 25, 2002. In a letter from the Board dated April 26, 2002, his absence was noted, the hearing dates highlighted again and the Respondents were warned that if no one attends on behalf of the Respondents on the hearing dates, the Board may make determinations of liability and remedy in their absence.

On May 2, 2002, the Complainant and the Commission attended at the Board for the hearing. The Respondents and/or a representative of the Respondents were not in attendance. The Board determined that the Respondents had ample opportunity to participate in the hearing, and despite clear warnings that matters may be disposed of in their absence, did not attend. The hearing proceeded in their absence.

At the hearing Ms Kalbfleisch was the only witness. She alone testified regarding her

medical condition and the circumstances of the events at issue.

FACTS

Jodi Kalbfleisch is a 24 year old who hails from Stratford, Ontario and now lives in Toronto. At approximately age 13 she was diagnosed as having a disability known as juvenile myoclonic epilepsy. As a result of her condition, she estimates that she suffers on average one or two seizures per year, but that it was not unusual for her to go for years at a time without a seizure. A warning sometimes, but not always, precedes her seizures. She candidly admits that the medication that she takes to control her seizures cannot guarantee that she won't have one. She testified that the main trigger for her seizures of which she is aware, would be sleep deprivation, although stress can also be a factor. The consumption of alcohol or anything that could contradict her medication could also trigger a seizure. Since January 2000 to the date of the hearing, she has been seizure free. The last two seizures that occurred were the one at the Bagel Stop in 1999, which gave rise to the Complaint, and one she suffered in January 2000, while employed at the Windsor Arms Hotel in Toronto.

One of the side effects of her medication is a slight tremor that affects her fine motor control skills. She testified that the tremor affects her penmanship, applying makeup and in things where one has to be specific and exact. With the tremor it takes her a little longer to do these things and requires a little more patience.

At the beginning of May 1999, Ms Kalbfleisch learned through the respondent Ruel Carillo's daughter (who had been enrolled in the same program of study as the Complainant at Ryerson Polytechnic University in Toronto, Ontario ("Ryerson")) that a full time job was available at the Bagel Stop restaurant located at 875 Bay Street, Toronto Ontario. The Bagel Stop specialised in serving bagels with an assortment of toppings. A small number of staff prepared the bagel sandwiches behind a countertop that separated the staff from the customers. Mr. Carillo is a director and directing mind of 1321257 Ontario Ltd., the company that carried on business as the Bagel Stop, and he operated the business.

Pleased at the prospect of employment while on summer courses at school, she spoke to Mr. Carillo on the telephone and was invited for an interview. By this time she had located an apartment in the area and the Bagel Stop was conveniently located only two blocks away.

The interview went well. Mr. Carillo reviewed her resume and the hours of operation, hours of her work and job duties. She was to work an eight hour day for a total of 40 hours a week, with the possibility of working on Saturday, but this was to be rare. Her hourly wage was to be $7.00.

In response to an inquiry from Mr. Carillo whether she could fulfil the job duties, Ms Kalbfleisch made reference to her part time work experience in a restaurant in Stratford, Ontario called the Sun Room as a bartender in a small bar filling drink orders for waitresses from recipe cards, her experience operating a snack bar that served a small buffet of hot entrees for students at Ryerson and that the job duties seemed similar to that which she did for herself and her family everyday. During the interview Ms Kalbfliesch also advised Mr. Carillo that she had epilepsy and her condition was discussed, in her words "for a couple of minutes". She described to him what epilepsy was and how it affects her. She advised that it was "a very minor condition, controlled by medication and that she has approximately one to two seizures per year". At no time before, during her employment, prior to her subsequent termination, or during their meeting on May 28, 1999 detailed below, did Mr. Carillo request that she provide any medical information or opinions relating to her epilepsy. After disclosing her epilepsy, assuring him that she felt that she could perform the job duties required and that the hours were suitable, she was offered and accepted the position. Mr. Carillo asked her to start on May 11, 1999.

On her first day of work on May 11, 1999 she was given a short tour of the Bagel Stop and was introduced to the staff. She watched some orders being filled and when she felt comfortable enough, she started doing the orders herself. At the hearing Ms Kalbfleisch testified that the duties of the job were accurately described in a handwritten document found at tab 9 of exhibit 1, which emanated from the Respondents, and explained that her job duties were basically to serve two kinds

of soup from warmed pots, prepare sandwiches out of bagels along with a variety of toppings, use a microwave and continuous toaster, refill coffee, on a nice day set up patio furniture, run to the corner store if items were used up and to maintain the cleanliness of the store.

In her opinion, there were no job duties that she found she was unable to perform, rather she found a "couple of things" awkward. She summed it up as follows: "I found them awkward but I adjusted until I found my niche…until I found my way of doing them". She didn't quite catch on that fast to the wrapping of the bagels and inserting it into the bag. This, however, she says may have had more to do with her having large hands than a disability. On occasion the soup or the "really, really" hot water that she served may spill out of the container, however, that was, she testified, more because of the length of time that she had to hold the hot container. She confirmed that at no time while working at the Bagel Stop did she cut or burn herself, although she stated that while she would not say "burned per se", when a customer ordered a bagel double toasted (and doubly-hot one would infer) it always came out of the toaster "extremely hot" to hold while she transported it from the toaster to the preparation counter. She has no recollection of ever breaking anything at the Bagel Stop, including during the seizure recounted below.

Prior to the events of May 25, 1999, Mr. Carillo never told her that her job was in jeopardy. The only incident that she can remember where Mr. Carillo gave her any feedback about her job performance was when he told her that she had exceeded the maximum number of tomato slices or hot peppers to be put on the bagel sandwiches. This was because he had observed her putting three on the bagel sandwiches, when the maximum number was two.

On May 25, 1999, Ms Kalbfleisch had a seizure at work. At the time Mr. Carillo was working on the premises. She had been taking her medication in the normal course but, as had occurred on occasion in the past, sensed the onset of the seizure with what she described as a "body shudder". She immediately turned to her two co-workers and told them that she needed to go home. As she was speaking to them she felt another "shudder" and asked if they had seen it. They said yes. She said that this was related to her epilepsy and that she had to go home. One of them looked at the clock

and asked if Ms Kalbfleisch could stay another ten minutes until the morning rush was over. She remembers looking up at the clock, seeing that it was ten minutes to nine and saying that "she would try or that yes she could". The next thing she remembers is waking up on a stretcher. She testified that during the seizure there was no damage to any property or injury to any person, including herself.

She was taken to hospital for observation and was released a couple of hours later. Because the hospital was close to the Bagel Stop she stopped by her place of work to return part of her uniform and retrieve her coat. When she entered the store it wasn't busy and the staff were surprised to see her. Ms Kalbfleisch advised Mr. Carillo that she needed to go home and rest and was going to do so. He expressed concern about how she was doing, told her to go home and that he would call her later that evening.

As he promised, Mr. Carillo called Ms Kalbfleisch on the evening of the May 25, 1999. They discussed how she was doing and feeling. She felt that there was genuine concern about her on his part. They then discussed Ms Kalbfleisch's return to work. She suggested that she could return on the Thursday since it normally took a day or two to recover, however, during the conversation she sensed some hesitation in his voice about letting her return at all. She became concerned that, because she was a new employee, a Thursday return was not going to acceptable so she offered to come back to work the next day, being the 26th. She hoped that she would be sufficiently recovered to return in that short period of time and that this would be acceptable to Mr. Carillo.

Unfortunately, her sense of hesitation on the part of Mr. Carillo was well founded. He explained to her that he was apprehensive about hiring her in the first place and that after what he had observed that day he didn't want to scare his customers with the fact that she might have another seizure. As was first broached at the initial interview, they discussed that there was no guarantee that this could not happen on another occasion. At that point Mr. Carillo said that it would be best if she didn't come back to work, and that he would pay her to the end of the week, being Friday the 28th of May. He said that she could come to work on that day to pick up her final pay.

Her reaction to this turn of events was hurt and "pure shock and disbelief". This was the first time in her life that she had been terminated from a position and she searched within herself to see what she had done wrong or what job duties she could not perform. She could find no justification for the termination. Because she is, as she describes herself, "an emotional person", she began to cry. When she hung up the phone, she called her parents. In the retelling, the events of the day became even more upsetting to her and she "got into a sobbing state". While on the phone with her parents another call came through. It was her boyfriend at the time. When she finished speaking with her parents she called him back. They discussed the situation and he urged her to file a complaint of discrimination.

On Friday May 28, 1999, Ms Kalbfleisch went to the Bagel Stop to pick up her paycheque. Before she received the cheque, Mr. Carillo wanted to sit down and discuss why she was terminated. He stated he was afraid that he might lose business. Not wanting to give up on the job, she asked whether there was anything she could do to change his mind. He replied no, that he had made up his mind. Her heart sunk. He said that he would write something on her record of employment other than the fact that she was fired so that it wouldn't follow her around on her employment record. He explained that he would check off one of the other boxes or criteria on the record of employment, so that it would not hinder her. At this point Ms Kalbfleisch remembers being somewhat confused and wondering what he was talking about. She ended up just nodding her head in agreement, "sort of still being in a state of shock". Shortly thereafter Mr. Carillo quickly wrapped up the conversation and gave her the cheque. She was paid the sum of $560.00, which, as set out in the copy of the record of employment filed at the hearing, represented employment income for the period from May 11 to May 27, 1999.

Ms Kalbfleisch testified that her treatment at the hands of Mr. Carillo has "most definitely" had a lasting impact upon her. Ever since the incident she is hesitant to divulge her epilepsy in an employment interview, despite her personal moral belief that she should be as "upfront as possible". As set out in the resume filed at the hearing, not surprisingly, the Bagel Stop is not listed as a place

that she worked. In her next job after the Bagel Stop, she was "very apprehensive" about disclosing the fact that she had epilepsy before she was hired and did not tell anyone about her epilepsy until the first day she worked. She also testified that in a recent job interview she wanted to recount how she dealt with her epilepsy in response to an interview question, but not wanting to divulge that she had epilepsy, she just stated that she had a medical condition instead. On a personal note, she is very careful how and when she tells people she has epilepsy, because she is not sure how they would react to it.

MITIGATION EFFORTS

Ms Kalbfleisch's efforts to mitigate her damages were unchallenged. She testified that other than an unsuccessful application for a job at the Sutton Place Hotel in Toronto, Ontario (the "Sutton Place") she did not recollect applying for any other part-time or full time work. Other than the 3 days of work at a convention for which she received $240.00, she did not obtain alternate employment until July 12, 1999, when on vacation she found employment at a rate of $6.15 an hour as a housekeeper at the Prince Edward Canadian Pacific/Delta, a hotel in Charlottetown, Prince Edward Island. She explained that the reason why she took that job was due to the problems that the timing of the termination presented. At the time she was terminated she still had summer school to complete and when she finished her exams at the end of June, she was planning a vacation to Prince Edward Island to visit her then boyfriend. She planned to be away from June 27 to July 7th. She testified that she probably would not have gone on vacation if she had continued working at the Bagel Stop, but after she had finished school and because of her emotional state after what had happened at the Bagel Stop she felt that she had to get away for awhile. She felt that she didn't want to deal with the "hassles" of Toronto and wanted to be with someone she was close to at the time. Since it was the last week of June at that point she reasoned while on vacation that she should try to work in Prince Edward Island rather than returning from her vacation to try to find work in Toronto until the end of August. She explained that this was because the pool of available jobs in Toronto was declining and competition for summer jobs was about to increase. Many university students on summer break had already been out since the end of May and had secured their summer jobs. In addition, at the end

of June high school students on summer break would also become her competition. Her search for work in Prince Edward Island met with success and she worked there until August 30, 1999, when she returned to school in Toronto.

ANALYSIS

The analysis of liability on this case is fairly straightforward. Disability is expressly defined in subsection 10(1) of the *Code* to include epilepsy. Subsection 5(1) of the *Code* provides that every person has a right to equal treatment with respect to employment without discrimination because of disability. Subsection 9 prohibits a person from infringing, or doing either directly or indirectly, anything that infringes that right.

The Complaint is brought against Mr. Carillo personally as the person who is alleged to have been directly responsible for infringing the Complainant's rights by terminating her employment because of her disability and is brought against the corporation, 1321257 Ontario Ltd., on the basis of its liability for the acts of Mr. Carillo, pursuant to subsection 45(1) of the *Code*.

As emphasized by the Board on many occasions, it is not necessary for Mr. Carillo to have acted with malice or ill-will toward the Complainant in order for there to be a finding of discrimination. The treatment of the Complainant may thus constitute discrimination if one of the reasons for the termination is related to her disability, even if Mr. Carillo honestly and genuinely believed that his actions were reasonable. Even if the Respondents established that her employment was subject to a probationary term, which they failed to do, it is also well established that that is no defense to a claim of discrimination. (See *Rapson v. Stemms Restaurants Ltd.* (1991), 14 C.H.R.R. D/449 (Ont. Bd. Inq.) ("*Rapson*") and *Allan v. Singh* (1993), 22 C.H.R.R. D/337 (Ont. Bd. Inq.) ("*Singh*"). Finally, without commenting on the merit of such an argument in this case, there was not sufficient evidence led at the hearing to support the Respondents' allegation that through failing to get enough sleep Ms Kalbfleisch was recklessly negligent (see *Ouimette v. Lily Cups Ltd.* (1990), 12 C.H.R.R. D/19 (Ont. Bd. Inq.) in somehow bringing the seizure upon herself.

Based on the totality of the evidence the Board is satisfied on a balance of probability that the Complainant was terminated because of her epilepsy. Even if Mr. Carillo had some concerns about the Complainant's job performance, which were not expressed to the Complainant, the Board is satisfied that the triggering, if not sole reason, for her termination was Mr. Carillo's fear that there would be a recurrence of a seizure and that customers would be scared away, causing a loss of business revenue.

The Complainant has therefore established a *prima facie* case. Although the Respondents led no *viva voce* evidence at the hearing, a review of a letter dated December 20, 1999, sent by the Respondents to the Commission prior to the referral of the Complaint to the Board, and the letter dated March 30, 2002 that Mr. Carillo sent to the Board, appears to advance, among other things, a defense under section 17 of the *Code*. This can be addressed in short order.

The authorities in this area of the law warn that an employer must never prejudge an employee on the basis of stereotypical assumptions about their disability, but rather, on the basis of their true capacities and abilities. On the evidence it is clear that Mr. Carillo had preconceived notions regarding Ms Kalbfleisch's disability and her ability or lack thereof to perform the functions of the job. This manifested itself in the treatment of Ms Kalbfleisch when she was terminated because of her epilepsy and the failure to take even the simplest of steps to investigate whether her disability could be accommodated in any way, whether to the point of undue hardship, or otherwise. The various reasons that were given for the termination in the correspondence dated December 20, 1999 and March 30, 2002 and in her final meeting with Mr. Carillo, including danger to herself and that other customers would be scared away if another seizure occurred, were also based on a lack of appreciation of the infrequency of her seizures and clearly support a conclusion that Mr. Carillo made misinformed and stereotypical assumptions about the nature of her disability.

The Respondents have failed to establish a defence under subsection 17(1) of the *Code*. On all the evidence the Board concludes that Ms Kalbfleisch was capable of performing the duties of

her job, whether essential or otherwise, safely and without undue risk to herself or others. That being said, even if a subsection 17(1) defence was available to the Respondents, the Respondents failed to provide any evidence on which the Board would conclude that it could not have accommodated Ms Kalbfleisch short of undue hardship on the basis of the considerations listed in subsection 17(2) of the *Code*.

As this case can be neatly characterized as one of direct discrimination it was not necessary to undertake an analysis along the lines of *British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U.* (1999), 35 C.H.R.R. D/257 (S.C.C.) ("*Meiorin*") and *Imperial Oil Ltd. v. Entrop* (2000), 37 C.H.R.R. D/481 (Ont. C.A.) ("*Entrop*"). That being said, even under a *Meiorin* or *Entrop* analysis, the result would be the same. This is because the Respondents failed to establish that they adopted a standard for a purpose rationally connected to the performance of the job; that they adopted the standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work related purpose; and that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose in the sense that it is impossible for the Respondents to accommodate individual employees sharing the characteristics of the Complainant without undue hardship.

In conclusion, the Board is satisfied on the basis of all the evidence that on a balance of probabilities that the Complainant's epilepsy in no way affected her ability to perform her job duties, essential or otherwise, at the Bagel Stop and the termination of her employment because of her epilepsy, constitutes discrimination.

REMEDY

Subsection 41(1) of the *Code* sets out the remedial authority of the Board in this matter. The Board can award public interest remedies and monetary compensation for the loss arising out of the infringement.

In Respect of Compliance and Future Practices

At the hearing the Commission requested a letter of assurance from Mr. Carillo. As the Commission could not say whether Mr. Carillo currently had duties involving the supervising or firing and hiring of employees, the Board is not satisfied that ordering such a remedy would be practical or indeed useful in all the circumstances.

Restitution, Including Monetary Compensation for Loss Arising Out of the Infringement

Pecuniary or Quantifiable Loss (Special Damages)

As stated in *Gohm v Domtar (No. 4)* (1990), 12 C.H.R.R. D/161 (Ont. Bd. Inq.), at paragraph 131, there is a duty upon the Complainant to undertake reasonable efforts to mitigate her damages, and the onus of proof in respect of any allegation of failure to mitigate lies upon the Respondents. In all the circumstances, although the Commission seeks to extend the period of claim to the date that Ms Kalbfleisch found the job in Prince Edward Island and the Complainant's counsel seeks to extend the period of claim to a date after August 30, 1999, there was no evidence led that, besides the job at the Sutton Place and the three day term at the convention, Ms Kalbfleisch made any other efforts to obtain or obtained part-time or full-time employment after her employment was terminated. While she asserted that there was a lot of competition in the job market, it does not appear that she made a concerted effort to find work of a similar nature after her termination until she went on vacation. The Board would have expected that Ms Kalbfleisch would have tendered evidence of visits to establishments similar to the Bagel Stop to support her claim that the competition from university and high school students so adversely affected her ability to find employment. While Ms Kalbfleisch made a reference to wanting to leave Toronto, among other things because of her emotional state, this was neither explained nor investigated further nor was there any specific indication of how her mental state affected her ability to conduct her job search. She was more than able to attend the interview at the Sutton Place that occurred shortly after her employment at the Bagel Stop was terminated. It is more likely that after her unsuccessful attempt

at employment at the Sutton Place, Ms Kalbfleisch's desire was to complete her exams and take a vacation after which she would start her job search. In all the circumstances, this does not satisfy her obligation to take reasonable efforts to mitigate her damages throughout the period claimed. Although it is difficult to determine an appropriate time frame, because she did make some efforts, had she made the appropriate efforts, it is reasonably foreseeable that she would have found a comparable job in the three-week period commencing May 28, 1999. As a result the Complainants' special damages claim for her wage loss will be limited to that period which ends June 17, 1999. After deducting the sum of $240.00 that the Complainant received for the work she did at the convention from June 11 to 13, 1999, the total award of special damages is $600.00 calculated as follows:

(3 weeks) x (40 hours per week) x ($7.00 per hour) = $840.00 - $240.00 = $600.00

Non-Pecuniary Intangible Damages (General Damages) and Mental Anguish

In reaching its conclusion regarding an appropriate award for general damages in this case the Board has been guided by the principles set out in prior Board decisions, and in particular those principles discussed in *Cameron v. Nel-Gor Castle Nursing Home and Nelson* (1984), 5 C.H.R.R. D/2170 (Ont. Bd. Inq.) *Airport Taxicab (Malton) v. Piazza* (1989), 10 C.H.R.R. D/6347 (Ont. C.A.), *Ontario (Human Rights Comm.) v. Ontario (Ministry of Health) (No. 2)* (1995), 24 C.H.R.R. D/250 (Ont. Bd. Inq.), *Shelter Corp. v. Ontario (Human Rights Comm.)* (2001), 39 C.H.R.R. D/111 (Ont. Div. Ct.), *Singh* and *Rapson*.

In all the circumstances the Board finds that an appropriate award of general damages is the sum of $3,500.00.

The Board has reviewed the evidence with respect to the claim for mental anguish. While the Board is satisfied that there is no requirement that medical evidence be given to substantiate the claim, in keeping with *Fuller v. Daoud* (2001), 40 C.H.R.R. D/306 (Ont. Bd.Inq.) ("*Fuller*"),

Kearsley v. St. Catharines (City) (2002), 42 C.H.R.R. D/304 (Ont. Bd. Inq.) and *Ketola v. Value Propane Inc.* [2002], O.H.R.B.I.D. No. 14 (Q.L.) (Ont. Bd. Inq.) a complainant must lead sufficient evidence to establish the right to an award. The Board agrees that Vice-Chair DeGuire's analysis in *Fuller* of what constitutes "mental anguish" is correct. At paragraph 66 of that decision she states:

> Mental anguish suggests a relatively high degree of mental pain and distress. It is more than mere disappointment, angry feelings, worries, resentment or embarrassment. Yet, it necessarily includes all of the foregoing. It does, however, include mental sensation of pain resulting from painful emotions such as grief, severe disappoint[ment], indignation, wounded pride, shame, despair or public humiliation (see Black's Law Dictionary, 6th ed.). Mental anguish is a subjective suffering that does not require medical proof.

While Ms Kalbfleisch has surely been affected by the termination of her employment because of her epilepsy, the Board did not hear sufficient evidence to establish that she has suffered mental anguish. As a result it not necessary to determine whether the infringement was engaged in wilfully or recklessly within the meaning of subsection 41(1)(b) of the *Code*.

Postjudgment Interest

In the Statement of Facts and Issues filed by the Commission under Rule 35 of the *Rules*, there is a claim for prejudgment interest on any monetary remedy awarded. There was no claim in the pleadings for the award of postjudgment interest that the Commission requested at the hearing. Counsel at the hearing advised that he did not draft the pleadings and could offer no explanation for the omission. Notwithstanding this failure to claim postjudgment interest expressly, in the Statement of Facts and Issues under Desired Remedy there is a "catch-all" provision in the pleading that reads as follows:

5. Other

    - Such further and other remedies as counsel may advise and as in the opinion of the Board will provide restitution to the complainant and

address the prevention of future violations of the *Code*.

The Commission took the position that the Board had a wide jurisdiction under subsection 41(1) of the *Code* to award postjudgment interest but that, in the alternative, if the Board felt that an amendment of the Statement of Facts and Issues was necessary to claim this amount, that such an amendment was requested.

The Board gave the Commission an opportunity to file materials in support of its position. These were filed shortly after the hearing was completed. For the most part the materials filed contain arguments and refer to authorities in support of the alternative submissions that the Commission made at the completion of the hearing. In its written submissions the Commission further submits that because the Respondents did not attend the hearing, they need not be given notice of the requested amendment nor served with an amended pleading. As indicated on the written submissions, a copy of the written submissions was sent to the Respondents by mail. Even though they were not invited to do so, this presented the Respondents with an opportunity to provide a response to these submissions. The Respondents remained silent.

It is trite to say that this issue could have been avoided through careful pleading. In *Impact Interiors Inc. v. Ontario (Human Rights Comm.)* (1998), 35 C.H.R.R. D/477 (Ont.C.A.) ("*Impact*") a case where prejudgment interest was allowed although none had been claimed in the complaint, the Ontario Court of Appeal laid to rest once and for all that it is open to the Board to make an award of interest under subsection 41(1)(b) of the *Code*. *Canada (Attorney General) v. Rosin* (1990), 16 C.H.R.R. D/441 (F.C.A.), a decision of the Federal Court of Appeal which upheld the jurisdiction of the Canadian Human Rights Tribunal to award postjudgment interest, is cited in *Impact* to support the proposition that the Board has jurisdiction to make the award, and sets out the rationale at paragraph 41 of its decision in the following way:

> Courts, including this Court, have held that interest may be awarded in other similar contexts, under the concept of "compensation," for to deny it would be to fail to make the claimant whole, especially in these days of high interest rates. (References Omitted)

While the jurisdiction to make the award exists, the question that arises in this case is whether such an award can be made when the specific relief is not claimed in the pleading. This reduces itself to a question of in all the circumstances, and considering the issue of fairness and natural justice, whether the Board should accede to the request.

The role of pleadings in Human Rights proceedings in Ontario was discussed in *Neusch v. Ontario (Ministry of Transportation) (No. 1)* (2002), CHRR Doc. 02-097 (Ont. Bd. Inq.) and need not be revisited here. Rule 35 of the *Rules* provides that the Statement of Facts and Issues should set out the desired remedy including any claim for interest. This infers that a claim for interest should be express. It is also a matter of fairness that a responding party be aware of the specific remedy sought, including any claim for pre or post judgment interest so that the respondent, if interested in participating in the proceeding, be given an opportunity to address the request, which in this case would have occurred at the end of the hearing had the Respondents attended. However, it must also be considered that denying the request in this case could essentially reward the Respondents' failure to attend.

An amendment is allowed for a variety of reasons and there is nothing stopping a party requesting an amendment at the end of a hearing as is done in civil proceedings, (see Subrules 26.01 and 26.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended). In *Odell v. Toronto Transit Comm. (No. 1)* (2001), 39 C.H.R.R. D/200 (Ont. Bd. Inq.), the Board set out some of the factors that the Board considers when exercising its discretion in considering an amendment request.

Leaving aside for the moment whether an amendment is necessary, the Board is not convinced that there would really have been anything for the Respondents to say in response to an amendment request if they availed themselves of the opportunity to respond. This is not a situation where a request is made at the end of the hearing to add a new ground of discrimination or head of damages that flows from a new ground. Postjudgment interest is often awarded in the normal course

on monies ordered payable by the Board. Subsection 17(2) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended ("*SPPA*"), which governs proceedings before the Board, provides that a tribunal that makes an order for the payment of money shall set out in the order the principal sum, and if interest is payable, the rate of interest and the date from which it is to be calculated. Subsection 19(1) of the *SPPA* provides that a certified copy of the Board's decision may be filed in the Superior Court of Justice and on filing is deemed to be an order of that Court and is enforceable as such. Orders for the payment of money filed in the Superior Court of Justice typically bear postjudgment interest (See Subsection 129(1) of the *Courts of Justice Act*, R.S.O. 1990 c. C. 43, as amended ("*Courts of Justice Act*"). Although the award of a statutory tribunal was silent on interest the Ontario Court of Appeal readily added postjudgment interest after the order of statutory tribunal had been filed (See the reasoning contained in *Northern & Central Gas Corp. Ltd. v. Kidd Creek Mines Ltd.* (1988), 66 O.R. (2d) 11 (Ont. C.A.)). As a result of the broad jurisdiction of the Board with respect to awarding interest under subsection 41(1)(b) of the *Code*, and the existence of the foregoing statutory provisions, it can not be said that it would not be in the contemplation of the Respondents that postjudgment interest would be due on any amount that the Respondents are ordered to pay.

Finally, although it may not be strictly necessary to do so, this is also the type of case that amounts to a rare circumstance where the claim for postjudgment interest falls within the "catch-all" provision set out above. This would relieve the Commission from requesting a specific amendment.

As a result, although it may not be strictly necessary, in the specific circumstances of this case, the Board will allow an amendment of the Statement of Facts and Issues to allow a claim for postjudgment interest on any monetary awards.

Interest Rate and Commencement Date

Prejudgment and postjudgment interest on the monetary awards shall be calculated based on the rates set under the *Courts of Justice Act*. Prejudgment interest shall run from May 28, 1999 to the date of this decision at the rate of 5.3 % per annum on the general damages award and from June 17, 1999 to the date of this decision at the rate of 5.3% per annum on the special damages award. Post-judgment interest on the monetary awards is to commence sixty days from the date of this Order.

JOINT AND SEVERAL LIABILITY

As stated above, Mr. Carillo is a director and directing mind of 1321257 Ontario Ltd., the company that carried on business as the Bagel Stop, and he operated the business. The Board finds it appropriate that its Order be as against 1321257 Ontario Ltd. and Mr. Carillo, jointly and severally.

ORDER

Upon finding that the Respondents violated Ms Kalbfleisch's rights under subsection 5(1), contrary to section 9 of the *Code*, the Board orders:

(1) the Respondents shall pay general damages to the Complainant in the amount of $3,500.00 , along with prejudgment interest on this amount from May 28, 1999 to the date of this decision at the prejudgment interest rate of 5.3% per annum.

(2) the Respondents shall pay special damages to the Complainant in the amount of $600.00, along with prejudgment interest on this amount from June 17, 1999 to the date of this decision at the prejudgment interest rate of 5.3% per annum.

(3) Postjudgment interest on the monetary awards, excluding interest, is granted at the rate as specified under the *Courts of Justice Act*, to commence sixty days from the date of this Order; and

(4) the Respondents are liable, jointly and severally, for the above awards.

Dated at Toronto, this 18th day of September 2002

Steven J. Faughnan
Vice-Chair